IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

State of Delaware,	:	
	:	
Plaintiff,	:	
	:	Cr. ID. No. 0504003419
v.	:	
	:	
Rashan Owens,	:	
	:	
Defendant.	:	

OPINION AND ORDER

Upon Defendant's Motion for Judgment
of Acquittal and/or New Trial

Submitted: June 15, 2010
Decided: July 16, 2010

Mark Conner, Deputy Attorney General, Department of Justice, Wilmington, Delaware; Attorney for the State.

Jennifer Kate Aaronson, Esquire of Aaronson & Collins, LLC, 8 East 13th St. Wilmington, Delaware; Attorney for the Defendant.

TOLIVER, JUDGE

Presently before the Court is the motion for judgment of acquittal and/or new trial filed by the Defendant Rashan Owens. That which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS
NATURE AND STAGE OF THE PROCEEDINGS

This litigation was spawned by two armed robberies of a branch of the Sun National Bank in Newark, Delaware. The first robbery took place on February 28, 2005. It was perpetrated by one individual who escaped with $5,101 in cash. The second event occurred on March 28, 2005. It involved two participants. An undisclosed amount of money was taken from the bank.

Mr. Owens was subsequently arrested and charged with one count each of Robbery First Degree and Conspiracy Second Degree as a result of his alleged participation in the February 28 robbery. He was charged with four counts of Robbery First Degree, four counts of Possession of a Firearm During the Commission of a Felony, one count of Conspiracy Second Degree and one count of Wearing a

Disguise During the Commission of a Felony based upon his alleged involvement in crimes that took place on March 28. Mr. Owens denied any involvement in either robbery. Also charged with various offenses related to the February 28 and March 28 robberies was Quinn Martin. Mr. Martin was charged with the same offenses as Mr. Owens.

Mr. Martin admitted his participation in the robberies and ultimately pled guilty on July 5, 2006 to one count each of Possession of a Firearm During the Commission of a Felony and Conspiracy Second Degree along with two counts of Robbery First Degree.

The charges against Mr. Owens were tried before the Court and a jury from November 14, 2007 to November 21, 2007.[1] On November 21, the jury returned its verdict. Mr. Owens was found not guilty of Counts I and II arising out of the February 28 robbery but found guilty of Counts III thru XII relating to the March 28 robbery. It is based upon those convictions that the remainder of the

[1] The specific dates of trial were November 14, 15, 16, 19 and 21, 2007.

controversy continues.

On November 30, 2007, the Defendant filed the instant motion seeking a judgment of acquittal, or in the alternative, a new trial. As might be expected, the State has opposed that motion.[2] A review of the evidence put before the Court and jury at the trial is therefore appropriate.[3]

March 28, 2005 Robbery

The facts which are relevant to the robbery which occurred on March 28 are relatively straight forward. On that date, two masked males entered the bank. The first masked assailant jumped on the bank counter where the

---

[2] By agreement of counsel, briefing and the ultimate resolution of the issues presented by the Defendant's motion was held in abeyance pending the appeal to the Delaware Supreme Court of a decision by this Court in *State v. Bridgers,* 2007 WL 6857631 (Del. Super. Oct. 19, 2007). In *State v. Bridgers*, the issue presented was similar to that being addressed here. That decision was affirmed on March 30, 2009. Counsel then resumed the prosecution of this matter and completed initial briefing of the issues raised herein on July 24, 2009. The Defendant supplemented his motion on June 15, 2010 to which the State chose not to reply.

[3] Given the fact that Mr. Owens was found not guilty as to the charges arising out of the February 28 robbery, the Court will not address the evidence pertaining to that event unless it has some bearing on the events of March 28.

teller stations were located. That was alleged to have been Mr. Owens. The second masked assailant, who was carrying a gun, went into the office of Sarah Arnold and ordered Ms. Arnold, a bank employee, to move under her desk. That individual is alleged to have been Mr. Martin.

While this was taking place, the first individual pulled out a black trash bag and began taking money from the cash register drawers. The money taken included what was referred to as "bait money" or money packed so as to conceal packs of colored dye. The dye packs were designed to explode after a short delay upon being activated by bank personnel.

After securing the money taken from the tellers, the two men proceeded to flee from the bank. As they were leaving, one or more of the dye packs inside the bag exploded staining the money a reddish color. The remainder of what subsequently took place is heavily in dispute.

According to Mr. Martin, he and Mr. Owens drove to the house of Troy Wiley and attempted to clean the dye-stained money. Their efforts were largely unsuccessful. Sometime

thereafter, Mr. Martin and Mr. Owens drove to Atlantic City, New Jersey and exchanged some of the dye-stained money for "clean" money using change machines in the casinos.[4] After departing from Atlantic City, the two went to a hotel in Chester, Pennsylvania, where they hid the money. At some later point in time, the money was retrieved and they made contact with Aaron Wray who agreed to assist them in getting rid of the tainted money from the March 28 robbery.[5]

On April 5, 2005, Mr. Wray drove Messrs. Martin and Owens to a car wash in Aston, Pennsylvania. It was at that location that the men parked their vehicle for a substantial period while they began exchanging the dye-stained money for clean money using a coin changer.[6] Their presence and/or that activity was noticed and deemed suspicious by members of the Aston Police Department who

---

[4] Apparently, the two individuals would insert the dye-stained money in change machines and receive "clean" money in exchange. Whether the money was paper or coin is unknown.

[5] One of the participants told Mr. Wray of the bank robbery but it is disputed as to whether it was Mr. Martin or Mr. Owens.

[6] This time, the process involved depositing the dye-stained money into a change machine and receiving quarters in exchange.

detained them at the car wash.

A search was conducted and dye-stained money was located in the trunk of the vehicle as well as on the persons of Mr. Wray, Mr. Martin and Mr. Owens.[7] All three were taken into custody following the discovery of the money and placed in police vehicles. The Defendant had $242 of dye-stained money on his person. While awaiting removal from the scene, Mr. Owens attempted to escape by kicking out the rear window of the police cruiser in which he had been placed.

Contentions of the Parties

Mr. Owens raises five arguments in support of his motion.

First, Mr. Owens argues that he is entitled to a judgment of acquittal as to Counts III thru XII because there was insufficient evidence to convict him on the charges contained therein. Mr. Owens alleges that there was no evidence of any kind that he participated or

[7] A plastic grocery bag containing $194.75 in quarters was found in the vehicle.

otherwise linking him to the robbery that occurred on March 28 other than the statements of Messrs. Wray and Martin, admitted participants in wrongdoing who repeatedly changed their stories to benefit their own interests.

Mr. Owens goes on to contend that since the jury found him not guilty as to Counts I and II, which related to the February 28 robbery, the jury must have rejected Mr. Martin's testimony as it related to Mr. Owens's involvement in that robbery. It would therefore be inconsistent with that verdict for the jury to believe Mr. Martin's testimony relative to the March 28 robbery. In addition, Mr. Owens alleges that the verdict as to the March 28 robbery was further undermined by the conflicting testimony given by Mr. Wray and Mr. Martin.

Second, Mr. Owens seeks a judgment of acquittal as to Count IX, Robbery First Degree. The purported victim in that count is Sarah Arnold, who was an employee of that branch of Sun National Bank. Mr. Owens contends that because no property was taken from Ms. Arnold, which is an essential element of that charge, he should not have been convicted of Robbery First Degree.

Third, the Defendant contends that he is entitled to a new trial based upon *Allen v State*.[8] He argues that given the Supreme Court's holding in *Allen*, this Court must grant him a new trial because the jury should have been charged on lesser included offenses of Robbery First Degree i.e., Robbery Second Degree and/or Aggravated Menacing. However, the Defendant admits that trial counsel did not request such an instruction be given to the jury.[9]

Fourth, Mr. Owens contends that he is entitled to a new trial based on the accomplice liability jury instruction given by the Court. Mr. Owens acknowledges that the Court's instruction was a correct statement of the law as it then existed.[10] Notwithstanding that concession, he argues that the instruction given by the Court still failed to adequately guide the jury as the trier of fact given the circumstances of the case. He directs the Court to the jury instruction given in this

---

[8] 970 A.2d 203 (Del. 2009).

[9] Def.'s Opening Br. at p. 16.

[10] *Id.* at p. 15.

regard in *Bland v. State*[11] as the more appropriate instruction.

Lastly, Mr. Owens alleges that he is entitled to a new trial based on the closing summation given by the State. He contends that counsel for the State repeatedly expressed its opinion as to the Defendant's guilt. Mr. Owens also complains that counsel for the State attempted to bolster the credibility of the its witnesses.

Obviously, the State disagrees and makes several arguments in response.

More specifically, the State argues that there was

---

[11] 263 A.2d 286, 289-90 (Del. 1970). The Delaware Supreme Court in *Bland* found that a jury instruction similar to the following language would be appropriate as to testimony of an accomplice:

> A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with suspicion and great caution. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.

sufficient evidence upon which to base a conviction of the charges lodged against Mr. Owens. In addition to the testimony of the admitted participants, the State contends that there was in fact other evidence linking Mr. Owens to the events of March 28.

In terms of the viability of the testimony of Messrs. Wray and Martin, the State submits that it was clearly credible. Any information to the contrary was put before and considered by the jury in rendering its verdict.

Next, the State contends that Mr. Owens is not entitled to a new trial pursuant to *Allen v. State*. To support its position, the State submits that no rational jury could have found the Defendant guilty of a lesser-included offense of Robbery First Degree because the Defendant knew that Mr. Martin would have a gun during the commission of the robbery at Sun National Bank. This, the State argues is corroborated by the testimony of Mr. Martin that the Defendant gave him a gun and told him how he was to use that gun during the robbery. In addition, the State contends that the jury's determination that the Defendant was guilty of Possession of a Firearm During the

Commission of a Felony shows that the jury determined that the Defendant had knowledge that a gun would be used in the robbery.

The State contends Mr. Owens is not entitled to a new trial as a result of alleged prosecutorial misconduct during closing arguments or because of the accomplice liability instruction given by the Court to the jury. The State submits that the use of the words "we know" in its closing argument was in no way prejudicial to jeopardize the fairness and integrity of the trial process. It goes on to argue that the defense did not object to the accomplice liability instruction given by the Court which was appropriate in any event. Mr. Owens was not, as result, entitled to a new trial for either reason.

Lastly, the State agrees with Mr. Owens that no property was taken from Ms. Arnold during the March 28 robbery. Although the State believes that there is a "grey" area in light of *State v. Bridgers*,[12] the State is not opposed to an amended finding of guilt of Aggravated

[12] 988 A.2d 939 (Del. Super. 2007) Aff'd. 970 A.2d 257 (Del. 2009).

Menacing in place of Count IX, Robbery First Degree.[13]

DISCUSSION

As noted above, Mr. Owens is seeking in the first instance, judgments of acquittal as to Counts III thru XII. Alternatively, he contends that he is entitled to have his convictions vacated and a new trial as to the underlying charges.

I. Judgment of Acquittal

A. Standard of Review

A motion for judgment of acquittal is governed by Superior Court Criminal Rule 29. In deciding whether to grant a motion for judgment of acquittal, this Court must view all legitimately drawn inferences and evidence in a light most favorable to the State and determine whether a rational fact finder could have found the defendant guilty

[13] The State does not address what this "grey" area is or how it applies to this case given the holding in *State v. Bridgers*.

beyond a reasonable doubt.[14] It is only where the State has offered insufficient evidence to sustain a verdict of guilt that a motion for judgment of acquittal will be granted.

B. Sufficiency of the Evidence

At trial, Mr. Martin testified as to what he and Mr. Owens did in connection with the events of February 28 and March 28. His version of what took place was consistent with that described by the bank employees who were present. He also testified that he and Mr. Owens went to Mr. Wiley's apartment after the March 28 robbery where Mr. Owens gave the gun used to Mr. Wiley. Mr. Wray identified Messrs. Martin and Owens as the source of the stolen funds. He also testified as to the group's efforts to remove the effects of the dye pack explosion from the Martin vehicle and the money found therein.[15]

---

[14] *Vouras v.* State, 452 A.2d 1165, 1169 (Del. 1982); *See* also *Tilden v. State*, 513 A.2d 1302, 1307 (Del. 1986) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

[15] That testimony was corroborated by the discovery of cleaning products in the Martin vehicle which contained the odor of bleach when it was processed by the Delaware State Police Evidence

No other evidence as to the February 28 robbery was presented to the jury besides the testimony of Mr. Martin. That was not the case as far as the March 28 robbery is concerned.

In this regard, the jury was presented with the following evidence in relation to the March 28 robbery:

1. Mr. Owens purchased a gun five months prior to the robbery and three different bank employees stated that Mr. Owens's gun looked like the gun used in the robbery;

2. Mr. Owens was found with $242 of red dye-stained money on his person when he was arrested with others who had similarly stained money;

3. The description of the robber who leaped the bank counter and stole money matched Mr. Owens's physical description;

4. The attempt by Mr. Owens to escape from the police cruiser on the night of his arrest in Aston, Pennsylvania; and

5. The gun purchased by Mr. Owens was found in Mr. Wiley's apartment where Mr. Martin said it would be.

Lastly, the jury was made aware of the challenges to

Detection Unit.

the testimony against Mr. Owens and to the credibility of those who gave it. The plea agreement between the State and Mr. Martin was introduced into evidence as was Mr. Martin's criminal history. The jury was privy to the deviations by Messrs. Wray and Martin from their initial accounts as to how they came into possession of the stolen money. They were also informed that Mr. Wray was not prosecuted for any offense relating to having the dye-stained money in his possession when he and the others were arrested at the car wash.

The function of a jury is to determine if the evidence at trial shows beyond a reasonable doubt that the defendant committed the crimes charged. "[I]t is the sole province of the fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts."[16] The jury has the "discretion to accept one portion of a witness' testimony and reject another part."[17] Moreover, a jury may base its

[16] *Poon v. State*, 880 A.2d 236, 238 (Del. 2005).

[17] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

verdict on the testimony of a single witness.[18]

Here, it is readily apparent that the jury was able to consider and evaluate the credibility of Messrs. Martin and Wray. It chose to accept Mr. Martin's version of the events of March 28, which was corroborated by other evidence, unlike the February 28 robbery, which was not. It was therefore not inconsistent for the jury to reject Mr. Martin's testimony about the February 28 robbery and to treat the evidence of the March 28 evidence differently. The Court must therefore conclude that sufficient evidence existed to support the jury's verdicts as to the March 28 robbery.

C. Irreconcilable Conflict

If there is an irreconcilable conflict in the State's evidence concerning the guilt of a defendant that would prevent a conviction beyond a reasonable doubt, the trial court must remove the case from the consideration of the jury and grant a motion for judgment of acquittal. The

[18] *Cintron v. State*, 2000 WL 201203, at *2 (Del. Feb. 4, 2000).

Defendant, thru supplemental briefing, argues that he is entitled to a judgment of acquittal because there is an irreconcilable conflict in the State's evidence.

As the Supreme Court recently decided in *Washington v. State*,[19] in order for there to be a irreconcilable conflict, the existence of three factors must be established. First, the conflict must be in the State's evidence. Second, the only evidence of the defendant's guilt must be the uncorroborated testimony of one or more accomplices. Lastly, the inconsistencies must be material to finding the Defendant guilty.[20]

In order for the Defendant to establish the first prong he must show that there is a conflict in the State's evidence. The Court finds no such conflict exists. There is no conflict in the statements of Messrs. Wray and Martin as to the Defendant. Mr. Wray never discusses the February 28 robbery. His story as to what the Defendant did focuses on the March 28 robbery. Mr. Martin only wavers as to his role, not the Defendant's involvement in the robberies.

---

[19] 2010 WL 2349060 (Del. June 8, 2010).

[20] *Id.* at *3.

Assuming *arguendo* that the first prong has been established, under the second prong of *Washington*, Mr. Owens must show that the only evidence of his guilt was the uncorroborated testimony of Messrs. Wray and Martin. The problem with the Defendant's challenge is that their testimony is not conflicting. Furthermore, as noted above,[21] there is other non-accomplice testimony to corroborate the Defendant's involvement in the March 28 robbery.[22]

Based on the foregoing, the testimony of Messrs. Wray and Martin, even if one were to consider it in conflict, was clearly corroborated. The second prong of *Washington*, as a consequence, has not been established. Since there was no conflict and the testimony of Messrs. Wray and Martin was corroborated, there is no need to address the third prong, i.e., whether any uncorroborated inconsistencies were material to a finding that Mr. Owens

---

[21] Section I, subpart B, of this opinion supports the Court's determination that at trial other evidence was presented to corroborate the testimony of Messrs. Wray and Martin.

[22] To the extent that Mr. Owens selectively challenges the viability of certain evidence, his arguments in that regard are simply not persuasive.

was guilty of robbing the Sun National Bank branch in Newark, Delaware.

II. New Trial

A. Standard of Review

The Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution guarantee a criminal defendant the right to have his or her case brought before an impartial jury.[23] A motion for new trial is governed by Superior Court Criminal Rule 33 and provides that this Court may grant a defendant a new trial if "required in the interests of justice."[24] A motion for new trial on the ground that the verdict was against the weight of the evidence is discretionary.[25]

---

[23] *Flonnory v. State*, 778 A.2d 1044, 1052 (Del. 2001).

[24] *State v. LeGrande*, 2006 WL 515453 (Del. Super. Feb. 28, 2006).

[25] *Hutchins v. State*, 153 A.2d 204, 206 (Del. 1959).

B. Allen v. State

Mr. Owens contends that pursuant to *Allen v. State*,[26] the Court must grant him a new trial. To be specific, Mr. Owens argues that the jury, as a result of *Allen*, was required to make an individualized determination regarding both his mental state and his culpability for any aggravating fact or circumstance as to Mr. Martin possessing a gun during the robbery. The Defendant admits that such an instruction was not requested by his counsel at trial.[27] This challenge must be denied for at least two reasons.

First, the Delaware Supreme Court has recently decided that *Allen* did not establish any new right and was not to be retroactively applied.[28] Rather, *Allen* constituted a clarification of the Court's holding in *Johnson v. State*[29] in so far as proceeding against a defendant under a theory of accomplice liability pursuant to 11 *Del. C. §* 274.

---

[26] 970 A.2d 203 (Del. 2009).

[27] Def.'s Opening Br. at p. 16.

[28] *Richardson v. State,* 2010 WL 2722690 (Del. July 12, 2010).

[29] 711 A.2d 18 (Del. 1998).

Because the holding in *Johnson v. State* was in effect at the time of the trial of Mr. Owens, *Allen* does not entitle him to any relief that did not exist at the time the jury rendered its verdicts.

Second, counsel for Mr. Owens, as noted above, did not request an instruction as to any lesser-included offense of Robbery First Degree. Counsel now argues that notwithstanding that election, which counsel does not suggest was the product of anything other than trial tactics, Mr. Owens should have his convictions for that offense vacated and a new trial ordered. It is this Court's failure, counsel argues, to instruct the jury to:

> make the statutorily required individualized determination regarding Defendant's 'own culpable mental state' and his 'own accountability for an aggravating fact or circumstance' i.e., the use of a gun.[30]

That argument is not persuasive given the holding of the Delaware Supreme Court in *Ramsey v. State*,[31]

In *Ramsey,* the Supreme Court held:

---

[30] Def.'s Opening Br. at p. 16-17.

[31] 2010 WL 2163880 (Del. May 26, 2010).

> Under 11 *Del. C.* § 206(c), a trial court may charge the jury of a lesser-included offense if 'there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense'. The trial court should not, however, instruct on an uncharged lesser-included offense if neither side requests such an instruction. That is because Delaware follows the 'party autonomy' rule under which 'the burden is initially on the parties, rather than the trial judge, to determine whether an instruction on a lesser-included offense should be considered as an option for the jury.'
>
> By its very nature, the 'party autonomy' rule is most relevant to jury trials. . . . 'The 'party autonomy' approach allows a defendant to exercise or waive the full benefits of reasonable doubt that [the consideration of a] lesser included offense . . . may promote . . . That rationale mandates that a trial court-whether or not it is sitting as a trier-of-fact defer to the parties' decision to address, or refrain from addressing, a lesser-included offense. That is because it is trial counsel 'who determine trial tactics and presumably act in accordance with a formulated strategy.' (Citations omitted.)

In sum, defense counsel apparently elected not to request an instruction for any lesser-included offenses of Robbery First Degree, as a matter of trial tactics. The

failure to do so, given the law applicable to that offense and in light of 11 *Del. C. §* 274, at least at this stage of the proceedings, is binding. Mr. Owens can not now be heard to complain about and ask the Court to void an election voluntarily made given the "party autonomy"[32] rule.

C. Jury Instruction

Mr. Owens submits that the Court should have instructed the jury that the testimony of an alleged accomplice should be examined "with suspicion and great caution" as was stated in *Bland*.[33] In this case, the Court instructed the jury as follows:

> The testimony of an alleged accomplice, someone, who said that he participated with another person in the commission of a crime, has been presented in this case . . . . The fact that an alleged accomplice has entered a plea of guilty to certain of the offenses charged does not mean that any other person is guilty of

[32] *See State v. Brower*, 971 A.2d 102, 107 (Del. 2009) (quoting *State v. Cox*, 851 A.2d 1269, 1272 (Del. 2003)).

[33] *Bland*, 263 A.2d at 289-90.

> the offenses charged. . . .
>
> You may consider all of the factors which might affect the witness's credibility, including whether the testimony of an accomplice has been affected by self-interests, by agreement he may have entered with the State, by his own interest in the outcome of the case against Mr. Owens, and whether or not the testimony was corroborated by any other evidence in the case.[34]

The instruction given, although it did not have the exact language recommended in *Bland*, nonetheless directed the jury to consider the testimony of an accomplice with the same degree of concern and skepticism. The Supreme Court in *Bland* did not mandate use of certain language but provided an example of what might be an appropriate instruction on the evaluation of accomplice testimony.[35] The Court met the applicable standard. Nothing more is required.

The Court must also point out that the defense did not object to the charge at trial. Moreover, defense counsel admits that the instruction given by the Court is a correct

---

[34] Trial Tr. on November 20, 2007 at p. 79.

[35] *Bland*, 263 A.2d at 289.

statement of law.[36] Defense counsel should not now be able to complain about strategic choices made during trial, presumably made after consulting with the Defendant.[37] At the very least, there was a waiver of the right to challenge the instruction given.[38] However it is viewed, a new trial is not "required in the interests of justice."[39]

D. Prosecutorial Misconduct

Owens contends that he is entitled to a new trial because the summation given by counsel for the State included his personal opinion as to Mr. Owens's guilt. Mr. Owens also contends that the State, during closing arguments, attempted to bolster the credibility of the State's witnesses i.e., Messrs. Wray and Martin. The

---

[36] Def.'s Opening. Br. at p. 15.

[37] If the Defendant has a complaint regarding the election by his counsel not to object to the instruction given, he can raise a challenge to the effectiveness of his counsel pursuant to Superior Court Criminal Rule 61.

[38] *See State v. Perkins*, 2005 WL 3007807 (Del. Super. Nov. 9, 2005); *Probst v. State*, 547 A.2d 114, 119 (Del. 1988); Super. Ct. Crim. R. 30, 52(b).

[39] *See supra* n. 24.

State, as previously noted, argues that there were no transgressions which merit a new trial.

In *Brokenbrough v. State*,[40] the Delaware Supreme Court relied on both the ABA[41] prosecution standards and the Delaware Rules of Professional Conduct in speaking on the conduct of a State Prosecutor expressing his/her own personal belief when the Court stated:

> [E]xpressions of personal beliefs by a prosecutor are a form of unsworn, unchecked testimony intended to exploit the influence of his office and undermine the objective detachment which should separate a lawyer from the cause which he argues.[42]

In short such arguments are prohibited. Here, Mr. Owens argues that the State improperly used the words "we know" several times during closing arguments.

The Court will review the record first to determine whether any alleged prosecutorial misconduct occurred. If

---

[40] 522 A.2d 851 (Del. 1987).

[41] The American Bar Association's mission is to serve equally its members, the legal profession and the public by defending liberty and delivering justice. *http://www.abanet.org/about/goals.html?gnav=global_about_mission*

[42] *Brokenbrough*, 522 A.2d at 858.

no misconduct is found to have occurred our inquiry ends. However, if the Court reaches the opposite conclusion further inquiry must be undertaken to determine whether the error complained of warrants a new trial in the interests of justice.

The first statement by the State about which Mr. Owens complains is: "[h]ere's what we know . . . . Sun National Bank was robbed on March 28, 2005, by two men. Quinn Martin we know is one of them and we now know the defendant is the other."[43] In reviewing the record, the Court does find the aforesaid statement improper, but the statement does not warrant a new trial for the following reasons.

In *State v. Savage*,[44] this Court granted a defendant a new trial based on improper statements by a prosecutor during closing arguments. In *Savage*, the prosecutor made several questionable statements during his closing argument, but defense counsel never objected. Moreover, the prosecutor speculated as to facts that were not presented at trial and that there was no direct evidence

---

[43] Trial Tr. on November 20, 2007 at p. 100-01.

[44] 2002 WL 187510 (Del. Super. Jan. 25 2002).

to support. *Sua sponte*, the Court twice interrupted the prosecutor to issue a curative instruction to the jury. The Court reasoned that "[b]y making [an] inferential leap without supporting evidence, the prosecutor had become an unexamined witness testifying to the jury."[45]

In closing arguments, a prosecutor may argue all reasonable inferences from the evidence in the record. However, a prosecutor should not intentionally misstate evidence or mislead the jury. Here, unlike in Savage, the evidence in the record did support the prosecutor's comments and were not an inferential leap that was unsupported by the evidence.[46]

Counsel for the State stated its belief that the evidence proved the Defendant was involved in the robbery that occurred on March 28. At trial, the State presented testimony of Messrs. Martin and Wray that Mr. Owens was involved in the March 28 bank robbery. Mr. Owens at the

---

[45] *Id*. at *5.

[46] In *Savage*, the prosecutor attempted to circumvent an evidentiary ruling by the Court, and reached conclusions unsupported by the record, which altered the outcome of the trial. *Id*.

time of his arrest was found with dye-stained money on his person and attempted to escape from a police officer's vehicle. The fact that the physical description of one of the robbers given by bank employees matched the Defendant was additional evidence brought before the jury. Therefore, the Defendant's alleged involvement in the robbery was information that was presented to the jury at trial and the statement cannot be said to warrant a new trial in the interest of justice.

The next alleged improper statement was also in relation to the March 28 robbery. The prosecutor stated that "[w]e also know that a second bank robbery occurred on March 28, 2005, at the Sun National Bank . . . . Of course, what he doesn't know and what we know is that his greed got the better of him because he also took fake money from each of those drawers."[47]

The Court finds at the outset that the statements by the prosecutor were in an effort to describe the second bank robbery that occurred, which was not in dispute. The issue in controversy was whether Mr. Owens was one of the

[47] *Id.* at p. 82-83.

robbers. In the alleged improper statement, the State never mentions the name of the Defendant, but rather used the word "he." The State contends that by not using the Defendant's actual name, the statement should not be considered improper. The Court disagrees because logically, the only "he" the State could be referring to was the Defendant.

The Court finds the statement to be on the same level as the first improper statement. Again, however, it does not arise to the level of warranting a new trial being granted based on the same reasoning illustrated under the first improper statement.

Lastly, the State began to summarize the evidence that was presented to the jury at trial including the testimony of Messrs. Wray and Martin. The State argued that "[n]ow, because of these actions and what we know, Mr. Owens is charged for both robberies . . . ."[48] Defense counsel alleges that the statement by the State was an attempt to bolster the testimony of Messrs. Wray and Martin. The Court disagrees. The words "we know," the Court does not

[48] *Id.* at p. 96.

find refer to the aforesaid individuals and the State, but only the State. The Court comes to this conclusion based on the fact that the State uses the words "we know" several other times in closing arguments without any reference to Messrs. Wray and Martin.[49] More importantly, the statement by the State related to information that was already introduced into evidence i.e., the charges which were not in dispute. Thus, it does not rise to the level of prosecutorial misconduct and the Defendant is not entitled to a new trial based on any improper statements by the State.[50]

III. Count IX - Robbery First Degree

Mr. Owens contends that he is entitled to a judgment of acquittal as to Count IX, Robbery First Degree because no property was taken from Ms. Arnold, a customer service representative. He goes on to contend that he can not be so convicted unless some property was taken from Ms. Arnold

---

[49] *See* Trial Tr. on November 20, 2007 at p. 83, 96 and 100.

[50] The Court also finds that the cumulative effect all three statements would not change the result reached.

because a theft is a requisite element of that offense. The State does not dispute the contention that no property was taken from Ms. Arnold and that Mr. Owens can not be convicted of Robbery First Degree as a result. The State, however, contends that he can be convicted of the lesser-included offense of Aggravated Menacing. Both parties reference the decision by this Court in *State v. Bridgers* which was affirmed by the Delaware Supreme Court.[51]

The Court agrees that *State v. Bridgers* controls the disposition of the continued viability of Mr. Owens' conviction of the Robbery First Degree charge set forth in Count IX.

In *Bridgers,* two men robbed a bank taking money from bank employees and held several customers at gunpoint to keep them from interfering while they carried out the crime. The *Bridgers* defendants were charged and tried on several counts of Robbery First Degree. At the conclusion of their trial, the defense requested that the jury be instructed as to Aggravated Menacing as a lesser-included

[51] 2007 WL 6857631 (Del. Super. Oct. 19, 2007); Aff'd. 2009 WL 824536 (Del. March 30, 2009).

offense of Robbery First Degree as to the bystanding customers. The Court granted that request. The jury was so instructed but returned verdicts of guilt as to the aforementioned Robbery First Degree charges.

Following those convictions, the defendants asked the Court to reconsider whether using the threat of force to prevent a bystander from interfering in the taking of property from others and from whom no property was taken, makes that bystander a victim of Robbery First Degree. The Court, after an extensive review of applicable Delaware case law, agreed with those defendants and held that someone who is merely a threatened bystander has not been robbed. Their convictions for those robberies were vacated and they were instead found guilty of the lesser-included offense of Aggravated Menacing.[52]

Given the holding in *Bridgers,* this Court finds that Mr. Owens is entitled to a judgment of acquittal of the conviction for Robbery First Degree as set forth in Count IX of the indictment. The Court can not impose a judgment of conviction for the lesser-included offense of Aggravated

[52] *Id.* at 944.

Menacing. Simply put, unlike *Bridgers*, neither side requested that the jury consider any lesser-included offenses of Robbery First Degree. The Court is without the authority as a result, to undue that election given the "party autonomy" rule discussed above and most recently recognized in *Ramsey v. State.*[53] Stated differently, the Court can not find Mr. Owens guilty of a lesser-included offense where it was not requested and the jury had no opportunity to consider the offense.[54] Mr. Owens, as a consequence, can not be convicted of any charge that may arise out of the allegations set forth in Count IX.

---

[53] *Ramsey*, 2010 WL 2163880, at *2.

[54] *Id.*

CONCLUSION

For the foregoing reasons, the motion for judgment of acquittal and/or new trial filed on behalf of the Defendant Rashan Owens, is **granted in part** and **denied in part.**

The Court finds that a judgment of acquittal is appropriate as to Count IX, Robbery First Degree. However, the Court cannot, under the circumstances and in light of the applicable law, enter a judgment of conviction against the Defendant for the lesser-included offense of Aggravated Menacing. The Court further finds that sufficient evidence existed to support the jury's verdicts as to Counts III thru VIII and X thru XII. Accordingly, the Defendant is not entitled to a new trial in the interest of justice pursuant to Delaware Superior Court Criminal Rule 33.

IT IS SO ORDERED.

_____

TOLIVER, JUDGE